Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-114 OF 2000

MOKHTAR SIDIN, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA

26 DECEMBER 2001

Arbitration *— Stay of proceedings — Application — Disputes referred to arbitration — Defence of respondent in arbitration was that monies payable to appellant had been assigned to assignee — Assignee not a party to arbitration clause — Allegation of fraud by respondent against third party — Whether issues raised in arbitration were outside jurisdiction of arbitration*

Civil Procedure *— Arbitration — Jurisdiction of arbitrator — Application for stay of arbitration proceedings — Whether issues raised in arbitration were outside jurisdiction of arbitrator*

The respondent appointed the appellant as its main contractor to construct a hotel and apartment project in Port Dickson. Pursuant to the building contract, all disputes between the respondent and the appellant were required to be referred to arbitration. The appellant terminated the contract due to non-payment by the respondent of a sum of money purportedly due under the building contract. The appellant then served on the respondent a statutory notice under s 218 of the Companies Act 1965 in respect of that sum of money. The respondent however succeeded in obtaining a court order to restrain the appellant from presenting a winding up petition based on the statutory demand. Subsequently, the parties agreed that their disputes under the building contract be dealt with by way of arbitration and an arbitrator was accordingly appointed. A first preliminary meeting was held between the parties and the arbitrator and at that time, there was no suggestion of any limitation on the arbitrator's authority or of any intention of referring matters back to court. However, the respondent's solicitors subsequently gave notice to the arbitrator that they would be making an application to the High Court to revoke the authority of the arbitrator on the grounds that they wished to raise issues that would not be suitable for arbitration and further stated that any further steps taken by the respondent in the arbitration proceedings would be done under protest and without prejudice. The respondent later filed its defence and counterclaim in the arbitration proceedings. The respondent's defence was that part of the monies claimed by the appellant had been assigned to UOL Factoring Sdn Bhd ('UOL') and that the respondent had given an undertaking to pay the same to UOL. The respondent further alleged that the appellant, the architect and engineer were fraudulent. Thereafter, the respondent filed an application seeking, inter alia, a declaration that the disputes between the respondent and the appellant were not arbitrable and an injunction to restrain the appellant from proceeding

with arbitration. The learned judge allowed the respondent's application. This was an appeal by the appellant against the decision of the learned judge. Amongst others, the appellant argued that the learned judge had erred in law and in fact in holding that issues pertaining to the assignment and the fraud on the part of the appellant, the architect and engineer were outside the jurisdiction of the arbitrator.

Held, dismissing the appeal:

(1) The appellant had contended that the learned judge had erred in fact in stating that the appellant raised s 34(1) of the Arbitration Act 1952 ('the Act') when it did not do so. However, upon a perusal of the appeal records, it was clear that the appellant had relied on *Sarawak Shell Bhd v PPES Oil and Gas Sdn Bhd*, a case that dealt with of the Act. As such, the learned judge had not committed any error on this issue (see p 80B–C).

(2) The learned judge had correctly held that issues pertaining to the payment of architect's certificate and the assignments as well as the fraud on the part of the appellant, the architect and the engineer, were outside the jurisdiction of the arbitrator. The purported assignment to UOL was not a part of the contract between the appellant and the respondent and UOL was not a party to the arbitration clause therein. Payments made to UOL could not be challenged or questioned in the arbitration. Further, the architect and the engineer were not parties to the arbitration clause and they could not be compelled to submit to arbitration. Therefore, allegations of fraud and collusion between the appellant, the architect and the engineer should not be determined in the arbitration. Instead, these allegations ought to be heard in open court (see p 80D–E).

(3) The High Court had supervisory jurisdiction over arbitration and arbitrators. In the instant case, the learned judge had duly considered and weighed the fact that the challenge to the arbitrator's jurisdiction was made after the commencement of the arbitration. This was because the issue had become clear only after the appellant had filed its statement of claim with the arbitrator and after the respondent had gone through its case for the preparation of the defence and counterclaim (see pp 81E, 82B–C).

(4) Where allegations of fraud had been made, the court had a discretion to stay the arbitration. The party charged with fraud was entitled as of right to a stay of arbitration whereas a party charging the other with fraud could seek the discretion of the court for a stay of arbitration. The fact that the respondent had charged the appellant, the engineer and the architect with fraud did not prevent the respondent from seeking a stay. The facts

revealed were more than sufficient for the learned judge to stay the arbitration and he had rightly done so (see pp 82F–G, 83A).

[Bahasa Malaysia summary

Responden melantik perayu sebagai kontraktor utama untuk membina sebuah projek hotel dan pangsapuri di Port Dickson. Menurut kontrak pembinaan, semua pertikaian di antara penentang dan perayu dikehendaki dirujuk kepada timbangtara. Perayu menamatkan kontrak disebabkan ketidakbayaran sejumlah wang oleh responden yang kononnya harus dibayar di bawah kontrak pembinaan tersebut. Perayu kemudiannya menyerahkan notis berkanun ke atas responden di bawah s 218 Akta Syarikat 1965 berhubung dengan jumlah wang tersebut. Walau bagaimanapun, responden berjaya memperolehi satu perintah mahkamah untuk menahan perayu daripada menyampaikan suatu petisyen penggulungan berdasarkan tuntutan berkanun. Berikutnya, pihak-pihak bersetuju bahawa pertikaian mereka di bawah kontrak pembinaan diuruskan melalui timbangtara dan seorang penimbangtara kemudiannya dilantik. Suatu mesyuarat permulaan yang pertama diadakan di antara pihak-pihak dan penimbangtara dan pada masa itu, tiada apa-apa cadangan tentang apa-apa halangan pada kuasa penimbangtara atau mengenai apa-apa hasrat untuk merujuk perkara-perkara kepada mahkamah. Namun demikian, peguamcara responden kemudiannya memberi notis kepada penimbangtara bahawa mereka akan membuat permohonan kepada Mahkamah Tinggi supaya membatalkan kuasa penimbangtara atas alasan bahawa mereka ingin membangkitkan isu-isu yang tidak sesuai untuk timbangtara dan selanjutnya menyatakan bahawa apa-apa langkah yang diambil oleh responden akan dilakukan di bawah bantahan dan tanpa prejudis. Responden kemudiannya memfailkan pembelaan dan tuntutan balas dalam prosiding timbangtara. Pembelaan responden adalah bahawa sebahagian wang yang dituntut oleh perayu telah diserahhak kepada UOL Factoring Sdn Bhd ('UOL') dan bahawa responden telah memberi akujanji untuk membayar jumlah yang sama kepada UOL. Responden seterusnya mengatakan bahawa perayu, arkitek dan jurutera telah bertindak secara fraud. Berikutnya, responden memfailkan permohonan meminta, antara lain, suatu perisytiharan bahawa pertikaian di antara responden dan perayu tidak sesuai untuk timbangtara dan satu injuknsi untuk menahan perayu daripada meneruskan timbangtara. Hakim yang arif membenarkan permohonan responden. Ini merupakan rayuan daripada perayu terhadap keputusan hakim yang arif. Antara lain, perayu berhujah bahawa hakim yang arif terkhilaf di sisi undang-undang dan fakta dalam memutuskan bahawa isu-isu berhubung dengan penyerahhakan dan fraud pada pihak perayu, arkitek dan jurutera adalah di luar bidang kuasa penimbangtara.

Diputuskan, menolak rayuan tersebut: A

(1) Perayu telah berhujah bahawa hakim yang arif terkhilaf dari segi fakta dalam menyatakan bahawa perayu telah membangkitkan s 34(1) Akta Timbangtara 1952 ('Akta tersebut') walhal ia tidak berbuat demikian. Walau bagaimanapun, atas suatu bacaan rekod rayuan, adalah nyata bahawa perayu telah bergantung pada B *Sarawak Shell Bhd v PPES Oil and Gas Sdn Bhd*, satu kes berkenaan s 34(1) Akta tersebut. Oleh yang demikian, hakim yang arif telah tidak melakukan apa-apa kesilapan atas isu ini (lihat ms 80B–C).

(2) Hakim yang arif telah memutuskan dengan betul bahawa isu-isu berhubung dengan bayaran sijil arkitek dan penyerahhakan serta C juga fraud pada pihak perayu, arkitek dan jurutera adalah di luar bidang kuasa penimbangtara. Penyerahhakan kepada UOL yang dikatakan bukanlah sebahagian kontrak di antara perayu dan responden dan UOL bukanlah suatu pihak kepada fasal timbangtara tersebut. Bayaran yang dibuat kepada UOL tidak D boleh dicabar atau dipersoalkan dalam timbangtara. Selanjutnya, arkitek dan jurutera tersebut bukanlah pihak-pihak kepada fasal timbangtara dan mereka tidak boleh diwajibkan menyerah kepada timbangtara. Maka, tohmahan mengenai fraud dan persubahatan di antara perayu, arkitek dan jurutera tidak boleh diputuskan dalam timbangtara. Sebaliknya, tohmahan-tohmahan ini haruslah E dibicarakan di mahkamah terbuka (lihat ms 80D–E).

(3) Mahkamah Tinggi mempunyai bidang kuasa penyeliaan atas timbangtara dan penimbangtara. Dalam kes ini, hakim yang arif telah menimbang dan menilai fakta bahawa cabaran kepada bidang kuasa penimbangtara telah dibuat selepas timbangtara F bermula. Ini adalah kerana isu menjadi jelas hanya selepas perayu memfailkan pernyataan tuntutannya dengan penimbangtara dan selepas responden telah meneliti kesnya untuk menyediakan pembelaan dan tuntuan balas (lihat ms 81E, 82B–C).

(4) Di mana tohmahan fraud telah dibuat, mahkamah mempunyai budi bicara untuk menggantung timbangtara. Pihak yang dituduh G dengan fraud berhak diberikan penggantungan timbangtara manakala pihak yang menuduh pihak yang satu lagi dengan fraud boleh memohon budi bicara mahkamah untuk penggantungan timbangtara. Hakikat bahawa responden telah menuduh perayu, jurutera dan arkitek dengan fraud tidak menahan responden H daripada memohon penggantungan. Fakta-fakta yang didedahkan lebih daripada mencukupi untuk hakim yang arif menggantung timbangtara dan beliau telah bertindak dengan betul (lihat ms 82F–G, 83A).]

Notes I

For cases on application for stay of arbitration proceedings, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1016–1034.

A For a case on the jurisdiction of an arbitrator, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) para 1304.

Cases referred to

B *Beaufort Development Ltd v Gilbert-Ash NI Ltd* [1998] WLR 860 (refd)
Camilla Cotton Oil Co v Granadex [1976] 2 Lloyd's Rep 20 (refd)
'Eastern Saga', The; Oxford Shipping Co Ltd v Nippon Yusen Kaisha [1984] 3 All ER 835 (refd)
Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57 (refd)
C *Radford v Hair & Ors* [1971] 2 All ER 108 (refd)
Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors [1998] 2 MLJ 20 (refd)
Tan Lay Soon v Kam Mah Theatres Sdn Bhd; Malayan United Finance Bhd (Intervener) [1992] 2 MLJ 434 (refd)
Turner v Fenton [1982] 1 WLR 52 (refd)
D *Turnock v Sartoris* (1890) 43 Ch D 150 (refd)

Legislation referred to

Arbitration Act 1952 ss 6, 25(2), 34(1)
Companies Act 1965 s 218
E Courts of Judicature Act 1964 Sch, para 11
Rules of the High Court 1980 O 92 r 4

Appeal from: Originating Summons No R2–24–64 of 1999 (High Court, Kuala Lumpur)

F *Logan Sabapathy* (*Ooi Huey Min* with him) (*Logan Sabapathy & Co*) for the appellant.
RR Sethu (*YS Leong* with him) (*Lye Poh Kham & Associates*) for the respondent.

G **Alauddin JCA** (delivering judgment of the court): This appeal against the decision of the High Court Kuala Lumpur arises out of a building contract in PAM Form (exh S1 in encl1). The contract was entered into between the respondent (plaintiff) as employer and the appellant (defendant) as the main contractor for a hotel and hotel apartment project in Port Dickson. The articles of agreement and conditions of contract are set out in exh S1 to Sum Weng Kuan's affidavit of 8 September 1999. The conditions of contract contain an arbitration cl 34(1), which states that all disputes shall be referred to arbitration (see p 62 encl 1).

On 10 March 1998, the appellant determined its employment as contractor pursuant to cl 26(1)(a) without prejudice to its other remedies for non payment of certified sums amounting to RM6,992,831.95. Then on I 11 March, 1998, the appellant served a statutory notice under s 218 of the Companies Act 1965 on the respondent in respect of the certified sums of RM6,992,831.95. The respondent contested the validity of the appellant's

termination notice by letter dated 12 March 1998 and urged the appellant to continue and complete the works. However, by a letter dated 8 April 1998 the respondent gave their own notice terminating the appellant's employment under cl 25(1)(b) of the contract. Thereafter, by way of Kuala Lumpur High Court (Bahagian Dagang) OS No D2–24–129–98, the respondent took steps to restrain the appellant from bringing a winding up petition based on the statutory demand. Finally, the learned judge in those proceedings found for the respondent on the basis that there were grounds for contesting liability as at the date of the statutory demand and issued the restraining order (see exh S10).

Both before and after the first set of High Court proceedings, the respondent had always insisted that the arbitration clause should be honoured and all disputes referred to arbitration. This is evidenced by four letters written by the respondent to the appellant on various dates in 1998 (see exh NLL 6, 7, 8, 10). By their letter dated 18 December 1998, the respondent's solicitors agreed to refer all issues to arbitration and proposed several names of arbitrators. Thereafter, as the parties were unable to agree to the choice of an arbitrator, the appellant, at the respondent's suggestion, applied on 5 January 1999 to the Kuala Lumpur Regional Centre for Arbitration ('KLRCA') for the appointment of an arbitrator pursuant to the arbitration clause. It must be emphasized that at this stage both parties were fully 'ad idem' that all disputes arising out of the contract should be dealt with by arbitration. However, the respondent had not signed the Letter of Acceptance of the arbitrator until now (see para 15 encl 1).

On 22 January 1999, the KLRCA appointed one Mr Khoo Choong Keow as arbitrator and his first preliminary meeting was held on 30 March 1999. At this meeting a detailed 'case management' programme was mapped out by the arbitrator. There was absolutely no suggestion of any limitation on the arbitrator's authority or of any intention of referring matters back to court. The statement of claim was filed by the appellant on 23 April 1999. In summary, the statement of claim raised the following issues:

(a) a claim for RM8,799,995.77 in respect of architect's certificate of payment under certificates 14-19;

(b) a claim for RM3,791,713.94 being the balance of work carried out by the defendant (appellant) but uncertified as at date of termination (including RM1,345,500 retention money):

(c) a claim for extension of time ('EOT') for package A up to 3 December 1997, or that the claimant had completed Package A within a reasonable time;

(d) that the claimant is entitled to reasonable extension of time to complete package B;

(e) claim for reimbursement of RM808,000 liquidated damages ('LAD') wrongfully deducted;

(f) the sum of RM510,000 acceleration costs resulting from acceleration at plaintiff's (respondent's) request;

(g) the sum of RM2,834,313.30 being 'direct loss and expense' claims made pursuant to cll 11(6) and/or 24(1) as a result of variations ordered by the architect and delay and/or disruptions;

(h) the sum of RM40,000 being loss of profits claimed under cl 26(2) of the contract;

(i) interest;

(j) general damages; and

(k) costs.

On 21 May 1999 M/s Skrine who had hitherto been the respondent's solicitors gave notice that they were discharging themselves as the respondent's solicitors. Subsequent to this, the arbitrator called a second preliminary meeting on 10 June 1999. At this meeting, the respondent who was unrepresented was given an extension of time until 9 August 1999 to file their defence and counterclaim.

On 1 July 1999, the respondent's current solicitors gave notice to the arbitrator that they would be making an application to the High Court to revoke the authority of the arbitrator on grounds that they wished to raise issues which would not be suitable for arbitration and would certainly be out of the ambit of arbitration, and hence any further steps taken in the arbitration would be under protest and without prejudice. It should be noted that this is the first occasion that the respondent ever gave any indication that they did not agree that all disputes be dealt with by arbitration in accordance with the contract.

On 9 August 1999, the respondent filed their defence and counterclaim in the arbitration proceedings. As regards the appellant's claim for payment under certificates 14–19 above, the respondent pleaded that these were monies payable to UOL Factoring Sdn Bhd ('UOL') by virtue of the undertaking given by the respondent to UOL dated 20 May 1997 and the letter from UOL to the respondent dated 12 June 1997 (see para 44 of defence and counterclaim).

Amongst the issues raised by the respondent in their counterclaim are as follows:

(a) a declaration that the claimant had wrongfully terminated the contract;

(b) a declaration that the claimant had procured the contract by means of fraud;

(c) a declaration that the claimant had negligently performed its obligation under the contract;

(d) a declaration that the architect's certificate was false and fraudulently made and not conclusive;

(e) quantified claims arising out of defendant's (appellant's) alleged wrongful termination consisting of:

(i) cost of completion of work by new contractor;

(ii) increased cost of scope of work undertaken by new contractor;

(iii) interest;

(iv) LAD for packages A and B;

(v) loss of revenue.

(f) quantified claims arising from defendant's (appellant's) alleged defective work and need to rectify same;

(g) damages for fraud and fraudulent misrepresentation by defendant (appellant)/architect engineer;

(h) damages for negligence by defendant (appellant)/ engineer;

(i) interest; and

(j) costs.

On 30 August, 1999 the appellant filed their reply and defence to counterciaim in the arbitration proceedings.

On 8 September, the respondent filed the OS, accompanied by the affidavit of Sum Weng Kuan (see exh S1) asking for the following relief:

(a) a declaration that the disputes between plaintiff (respondent) and defendant (appellant) under the building contract are not arbitrable;

(b) an injunction to restrain the defendant (appellant) from proceeding with arbitration;

(c) the authority of the arbitrator be revoked;

(d) arbitration proceedings be stayed pending decision of the court.

The OS was served on the appellant on 29 September 1999 and on the arbitrator on 4 October 1999. The hearing of the OS was fixed on 25 November 1999. At the end of the hearing of the OS the learned judge concluded that the plaintiff (respondent) ought to be allowed to proceed with his action in court. He, therefore allowed order in terms of the plaintiff's (respondent) application. Hence, the present appeal before us.

Before us the learned judge's decision was attacked on the following grounds:

(1) The learned judge erred in fact in stating that the appellant raised s 34(1) of the Arbitration Act 1952 ('the Act'). The appellant never raised this issue and concedes that the Act applies.

(2) The learned judge erred in law and in fact in holding that the following issues are outside the jurisdiction of the arbitrator:

(a) payments of architect's certificates and assignments;

(b) fraud, collusion and misconduct of appellant involving architect and engineer.

(3) The learned judge erred in law and in fact in that he failed to realize that the issue was not whether the High Court had original jurisdiction to hear and determine such matters but whether:

(i) the High Court had jurisdiction to; or

(ii) if it did have jurisdiction, ought in its discretion to take over the hearing of such matters after the commencement of the arbitration.

The learned judge ought to have held that after the commencement of the arbitration, the High Court had no jurisdiction to make the orders sought in this application or to take over the proceedings from the arbitrator either under its inherent powers or under the Act or other statutory provisions except in respect of allegations of fraud pursuant to s 25(2) of the Act and that under the said subsection the court's powers are limited to taking over only the issues relating to the allegations of fraud.

The learned judge ought to have held on the contrary that the arbitrator had full jurisdiction to hear and determine all issues raised in the pleadings before him.

(4) The learned judge erred in law and in fact in holding that because allegations of fraud have been made in the pleadings in the arbitration proceedings, it must follow that s 25(2) of the Act should be applied to remove the arbitration proceedings to the High Court. The learned judge ought to have held that so far as the allegations of fraud are concerned, the court has a discretion to take over the hearing from the arbitrator pursuant to s 25(2) of the Act and the learned judge ought to have exercised his discretion against granting the orders sought on the grounds that:

(a) this is not a case where the court was being asked to exercise its discretion to refuse a stay of court proceedings under s 6 of the Act prior to the commencement of arbitration, but where the respondent had all along insisted on arbitration and had willingly participated in the arbitration proceedings;

(b) in this case, it is the party alleging fraud and not the party charged with fraud which is seeking a High Court trial;

(c) the balance of convenience strongly favoured that the allegations of fraud be dealt with by the arbitrator inter alia to avoid a split hearing, because of the many technical issues raised In the pleadings and because the allegations of fraud involved allegations of collusion between appellant and architect and engineer which would be well within the competence of the arbitrator to rule.

(5) The learned judge had erred in law and infact in holding that the arbitrator had himself ruled that part of the dispute is outside his jurisdiction and that the appellant is bound by that ruling and that the present application by the respondent complies with that ruling. In his finding the learned judge erred in law and in fact in that his finding was based on a wholly erroneous interpretation of the arbitrator's

ruling in his letter to the parties dated 15 October 1999 (exhibit s 25) which has to be read together with the minutes of the third preliminary meeting (exh s 24). A

We shall now consider all the grounds raised by learned counsel for the appellant in this appeal.

In his first ground counsel denied that the issue of s 34(1) of the Act was ever raised in his submission before the learned judge. It was therefore wrong for the learned judge to rule that he did. We have taken great pains in perusing the records available before us. At p 119 of 1 A/R, we found that the learned judge had recorded the appellant's submission that they relied on s 34(1) of the Act. On further search of the records we discovered that in their written submission (see 4 A/R 1276 para 8.1 (C)) the appellant relied on the case of *Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors* [1998] 2 MLJ 20 which dealt with s 34(1) of the Act. With respect to learned counsel for the appellant we find that the learned judge had not committed any error on this issue. B C

The second ground raised by learned counsel for the appellant deals with the issues of assignments, fraud, collusion and misconduct of the appellant involving the architect and the engineer. We agree with the learned judge that these are issues outside the arbitrator's jurisdiction. In the first place we find that the assignment is not part of the building contract. UOL is not a party to the arbitration clause under the building contract. Payments made to UOL cannot be challenged or questioned in the arbitration. The consultants, namely the architect and the engineer are not parties to the arbitration clause. Allegations of fraud and collusion between the contractor and the consultants should not be determined in the arbitration. Instead these allegations ought to be heard in open court. The assignment and allegations of fraud and collusion with the consultants are loosely connected with the claim. D E F

The fact that the appellant disputes these allegations is irrelevant. The allegations have to be tried and the question is who should or can try them: the court or the arbitrator?

In *Camilla Cotton Oil Co v Granadex* [1976] 2 Lloyd's Rep 20, the House of Lords held: G

> ... since the dispute involved the question whether any party had been guilty of fraud, the matter ought to be heard in the High Court rather than by arbitrators and s 24(2) of the Arbitration Act 1950 applied.

The issue of fraud was also raised and discussed in *Radford v Hair & Ors* [1971] 2 All ER 1089, Pennycuick VC in his judgment held at p 1093: H

> Turning back to the present case it seems to me that the allegation ... impute to the plaintiff actual dishonesty. It alleges, first, that he has been engaged or behalf of clients ... in which he had an interest, secondly, that he made a false statement ... ; and thirdly, that he made a false statement ... Those are all contentions involving actual dishonesty ... . It is quite true that fraud is not specifically mentioned but it seems to me ... an allegation of fraud is to be regarded as sufficient reason for taking the case away from I

A arbitration and letting it be decided by the court (see also *Markholm v Am Bisley & Lotus* [1970] NZLR 1042 and *Eagle v NIMU Insurance Co* [1967] NZLR 698).

Where some are parties and others are not parties to the arbitration it is best that their disputes be dealt with by the court.

B In *The 'Eastern Saga'; Oxford Shipping Co Ltd v Nippon Yusen Kaisha* [1984] 3 All ER 835, the court held:

> Since arbitration is a private procedure it is an implied term of an arbitration agreement that strangers to the agreement are excluded from the hearing and conduct of an arbitration under the agreement. In the absence of the consent of all parties an arbitrator has no power to order that a dispute referred to
C arbitration under the agreement be heard or determined with another dispute involving a stranger which has been referred to arbitration under a different agreement, even though the two disputes are closely related and a consolidated hearing would be convenient' (see also *Bauer (M) Sdn Bhd v Daewoo Corporation* [1999] 4 MLJ 545 at p 561 (CA); *The 'Vimeira'; Interbulk Ltd v Aiden Shipping Co Ltd* [1984] 2 Lloyd's Rep 66 at p 75).

D Moreover, disputes between parties cannot be divided so that part is dealt with by arbitration and another part in court (see *Tumock v Sartoris* (1889) 43 Ch D 150).

On the above premise, we find that we are in entire agreement with the learned judge's finding that many issues have arisen which are outside the
E jurisdiction of the arbitrator.

The third ground raised by learned counsel touches upon the jurisdiction of the High Court in matters of arbitration. There is no doubt that the High Court has supervisory jurisdiction over arbitration and arbitrators. Section 25(2) of the Act provides:

F

> Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to arbitration and a dispute which so arises involves the question whether any such party has been guilty of fraud, the High Court shall, so far as may be necessary to enable that question to be determined by the High Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke the
G authority of any arbitrator or umpire appointed by or by virtue of the agreement.

Paragraph 11 of the Schedule to the Courts of Judicature Act 1964 provides additional power to the High Court to dismiss or stay proceedings by reason of multiplicity of proceedings. In any event, the High Court can invoke its
H inherent powers under O 92 r 4 of the Rules of the High Court 1980 to make any order as may be necessary to prevent injustice. In the instant appeal the respondent should not be harassed by succession of proceedings as they are under a threat of a winding up petition.

The House of Lords in *Beaufort Development Ltd v Gilbert-Ash NI Ltd*
I [1998] WLR 860 held:

> ... that the arbitration clause was intended to confer on the arbitrator the plenitude of powers possessed by the court to determine the rights of the

> parties; that it was necessary to spell out those powers in the case of the arbitrator but not in the case of the court since his powers were derived from the contract under which he was appointed, whereas the court's jurisdiction was unlimited; that, therefore, the fact that power to open up, review and revise was expressly conferred upon the arbitrator but not upon the court could not be construed as removing the court's power, and that, accordingly, in the circumstances, there would be no injustice to the Contractors in refusing a stay. (See also *Compagnie Europene de Dereale SA v Tradax Export SA* [1986] 2 Lloyd's Rep 301 at pp 304–305; *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd* [1999] 4 AMR 4653).

In the instant appeal, the learned judge had duly considered and weighed the fact that the challenge to the arbitrator's jurisdiction was made after commencement of the arbitration. The issue had become clear only after the appellant filed its statement of claim with the arbitrator and the respondent went through its case for the preparation of the defence and counterclaim.

The ousting of the arbitrator's jurisdiction is not limited to fraud alone but extends to:

(a) the avoidance of multiplicity of suits;

(b) the allegations connected to the subject matter which affects parties who are outside the arbitration clause; and

(c) all issues ought to be tried by one tribunal.

In *Tumock v Sartoris* (1889) 43 Ch D 150, the Court of Appeal held:

> ... that it would not be right to split up the action by referring to arbitration the matters arising under the lease, leaving the action to proceed as to the other matters, and that even if the arbitration clause could be construed so widely as to cover all the matters in respect of which damages were claimed, it would not be proper to refer them to an arbitrator, as he would have no power to determine the construction of the agreement and its effect upon the provisions of the lease.

We shall now turn to the fourth ground. In answer to counsel's submission we would say that where allegations of fraud are made the court has a discretion to stay the arbitration. The test for exclusion of the allegation of fraud whether for stay under s 6 or for revocation of the authority the arbitrator under s 25(2) is the same and the same considerations and principles are applicable to both. In *Turner v Fenton* [1982] 1 WLR 52, the court held:

> ... that where allegations of incompetence, negligence and impropriety were made so that a man's professional reputation was at stake, he ought to have the benefit of a trial in the High Court, even though no allegations of actual fraud or dishonesty were involved: further, that questions of the construction of a partnership agreement were also justification for retaining a case in the High Court despite an arbitration agreement, and, accordingly the stay of proceedings would be refused and the action allowed to proceed in the High Court' (see also *Rodford v Hair* [1971] 2 All ER 1089; *Taunton-Collins v Cromie* [1964] 1 WLR 633 and *Halifax Overseas Freighters Ltd v Rasno Export* [1958] 2 Lloyd's Rep 146).

A The party charged with fraud is entitled as of right to a stay of arbitration whereas a party charging the other with fraud can seek the discretion of the court and the fact that the respondent here is charging the appellant (and the consultants) with fraud does not prevent them from seeking a stay. The facts revealed are more than sufficient for the learned judge to stay the arbitration and we believe he had rightly done so.

B

The engineer and the architect are not parties to the arbitration clause and they cannot be compelled to submit to arbitration and the arbitrator has no jurisdiction over them. The allegations of fraud and collusion between the appellant, the engineer and the architect cannot be dealt with in any C proceedings (including arbitration) unless both the engineer and the architect are parties to those proceedings.

We now turn to the last ground. Under this ground learned counsel made reference to exhibits ss 24 and 25 of the Act. According to counsel, the learned judge should have read both documents together before D concluding that the arbitrator had declined to deal with those allegations mentioned earlier.

Looking at s 24 of the Act (the minutes of the preliminary meeting No 3) we find that the arbitrator did not make any ruling or decision there. He merely deferred his decision. But we find the arbitrator's ruling in s 25 E of the Act is very clear. This is what he said (para 2):

> During Preliminary Meeting No 3 the parties' oral submissions (on whether to continue with arbitration) dealt with issues of jurisdiction and arbitrability (fraud, assignment and joinders) balance of convenience, estoppels and delay to the arbitral proceedings. The first two issues now lie at court by virtue of F respondent's application to court and therefore it is not within my purview to consider these issues. The remaining issues may also very likely be argued at court. It is only necessary and open to me to consider whether continuation of the arbitral proceedings could lead to much abortive work in the event arbitration proceedings are to be terminated and the disputes referred to court.

G Based on s 25 of the Act alone, we find that the learned judge is more than justified in coming to his conclusion that the arbitrator had declined to deal with those allegations. Further, the appellant had not made any application to correct or set aside that view of the arbitrator. We can also find no fault with the learned judge's finding that the appellant is bound by the H arbitrator's ruling and that the application by the respondent complies with that ruling. The ruling of the arbitrator is binding on both parties (see *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 and *Tan Lay Soon v Kam Mah Theatres Sdn Bhd; Malayan United Finance Bhd (Intervener)* [1992] 2 MLJ 434).

I Premised on the above, and having given this matter our utmost consideration we are unanimous that this appeal cannot succeed. The appeal is hereby dismissed with costs.

My learned brothers Mokhtar Sidin and Abdul Kadir Sulaiman JJCA agreed with the decision delivered at the conclusion of argument. They have read this judgment in draft and express their agreement with it.

Appeal dismissed.

Reported by Peter Ling